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Case Comments

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ATTORNEY AND CLIENT—ATTORNEY'S CONTRACT TO PROCURE CHANGE IN ROAD, LOCATION HELD NOT VOID AS AGAINST PUBLIC POLICY BECAUSE OF ATTORNEY'S BEING STATE SENATOR.—Plaintiff, an attorney entered into a contract with P, by the terms of which P employed plaintiff as attorney and legal adviser to represent his interest in having the location of a state road changed. In consideration of such legal services and other legal advice pertaining to the matter and causing the road to be located across the land of P where it was most desirable and would do the least damage to P, he agreed to convey 10 acres of land to plaintiff. Plaintiff succeeded in having the location changed, and now seeks specific performance of P's contract to convey the land. Defendant urges that the contract was void as against public policy in that plaintiff was at the time a state senator from that district. Held: That the attorney's contract was not void as against public policy merely because the attorney attempting to secure the road change was a state senator. *Parkey* v. *Brock*, 222 Ky. 34, 299 S. W. 1061.

It is necessary first to determine what is meant by against public policy. It has been held that a contract which is against public policy is one which has a tendency to be injurious to the public, or against the public good, or if the contract binds the parties or either of them, to do something opposed to the public policy of the state it is illegal and void. *Kentucky Association of Highway Contractors* v. *Williams*, 213 Ky. 167, 280 S. W. 937, 45 A. L. R. 544. This is the general rule as set forth by the text writers. Greenhood, Public Policy, page 179, 3 Williston, Contracts, sections 1729a, 1760, 1761. Some of the decisions of the Kentucky court announcing this general principle are: *Gordon* v. *Gordon*, 168 Ky. 409, 182 S. W. 220, L. R. A. 1916D, 576; *Westerfield-Bonte Co.* v. *Burnett*, 176 Ky. 188, 195 S. W. 477; *Nortonville* v. *Woodward*, 191 Ky. 730, 231 S. W. 224.

If it had been true as suggested in appellant's brief that the appellee as a state official contracted to use his influence as such to locate a highway at a certain place, the court would undoubtedly have declared the contract void as against public policy. *Gordon* v. *Gordon's Adm'r*, 168 Ky. 409, 182 S. W. 220, L. R. A. 1916D 576; *Lucas* v. *Allen*, 80 Ky. 681, 4 Ky. Law Rep. 687; *Allison* v. *Dodge*, 287 Fed. 621; *Spaulding* v. *Maillet*, 57 Mont. 318, 188 Pac. 377; *Bryant Lumber Co.* v. *Fourche River Lumber Co.*, 124 Ark. 313, 187 S. W. 455; *Robinson* v. *Patterson*, 71 Mich. 181, 39 N. W. 21. A state official cannot sell his influence to the public for such purposes. But there is nothing in the contract which suggests that he was employed for the purpose of using his influence. On the other hand the contract shows clearly that he was employed to represent P in a legal capacity. This contract did not bind either plaintiff or P to do anything opposed to the public policy of the state, and the consideration expressed therein is not against the public policy of the state, and there is nothing in the contract which indicates a

tendency to be injurious to the public or against the public good. The court was clearly correct in holding that the mere fact that plaintiff was a state senator was insufficient to render the contract void as against public policy. R. R. R.

CONSTITUTIONAL LAW—COMMONWEALTH HAS NO VESTED RIGHTS IN ESCHEATED PROPERTY WHICH WILL PREVENT THE LEGISLATURE FROM DETERMINING THE POLITICAL SUBDIVISION TO WHICH IT SHALL GO.—The Attorney-General brought escheat proceedings against a bank and after an adverse decision in the state court, the bank appealed the case to the United States Supreme Court. While this suit was pending a compromise was reached, by which money was paid into the state treasury, also a statute was passed, section 3587a-22, providing that property which should escheat to the state in any district should vest in the school board, of that district, for the use and benefit of the public schools. The board of education of the city brought this action to recover the money paid to the state under the circumstances stated. Held: The legislature had the absolute power to dispose of escheated property. *Shanks, Auditor* v. *The Board of Education of the City of Winchester*, 221 Ky. 470, 298 S. W. 1111.

Section 192 of the Kentucky Constitution and section 567 Kentucky Statutes give the state the right to take realty by escheat from any corporation which holds it more than five years, provided such property is not, "proper and necessary for carrying on its legitimate business."

Although the word "escheat" as here used is not in strict conformity with the common law meaning, it represents a power which has been recognized since the days of Justinian, a power which Anglo-Saxon jurisprudence has completely accorded the state as the original and ultimate owner of all property within its jurisdiction. Bouvier's Law Dictionary—Escheat. The legislature cannot impair the vested rights of private citizens. Cooley—Constitutional Limitations, page 745-760; *Shell* v. *Matteson*, 81 Minn. 38, 83 N. W. 491. Yet it must be admitted that escheated property is subject to the control of the law making power and therefore the state has no vested rights in it beyond the reach of the legislature. *Commonwealth* v. *Thomas Adm'r's*, 140 Ky. 798, 131 S. W. 797. Since the Kentucky Constitution makes no provision for dealing with escheated property, this power in the legislature is absolute.

The Kentucky court has held that neither the institution of escheat proceedings, nor the mere witholding of property contrary to these provisions, *ipso facto* works an escheat. But there must be a final judgment declaring escheat. *Louisville School Board* v. *King*, 127 Ky. 824, 107 S. W. 247.

The power to provide for forfeitures and penalties rests in the legislative branch of our government, but the power to inflict them belongs to the judiciary. *Marshall* v. *McDaniel*, 12 Bush 378.

In the instant case, the court followed the rule laid down in the above mentioned cases, and since no final judgment had been entered when the above statute was passed the land had not escheated. It therefore came within the purview of the statute and must be governed by its provisions. J. C. B.

CONSTITUTIONAL LAW—WHERE JUSTICE'S FEES AND COSTS WERE DEPENDENT ON CONVICTION, DEFENDANT HELD TO HAVE BEEN DENIED DUE PROCESS OF LAW.—The appellant was arrested upon a warrant charging him with obstructing a public highway. Upon trial before a justice of the peace, the appellee, and a jury, the appellant filed his affidavit in which he stated he could not get a fair and impartial trial. In support of his motion that the justice vacate the bench, the appellant stated that the appellee was pecuniarily interested in the case and would receive a portion of the fine as well as costs in case of conviction. The appellee refused to vacate the bench and the appellant was found guilty and fined ten dollars. The appellee entered judgment for ten dollars and twenty dollars and eighty cents costs. Of this amount the appellee received six dollars. The appellant filed his bill seeking to enjoin the enforcement of that judgment. Held, that a demurrer to the bill setting forth these facts should be overruled and upon proper proof the relief asked should be granted. *Wagers* v. *Sizemore et al.*, 222 Ky. 306, 300 S. W. 918.

The Court of Appeals followed the decision of *Tumey* v. *State of Ohio*, 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 50 A. L. R. 1243, which held invalid a statute of that state making the compensation of inferior judges depend upon the conviction of the defendant under trial. The basis of that decision was that such a system was violative of the Constitutional provision prohibiting the states from depriving "any person of life, liberty, or property without due process of law." United States Constitution, Amendment XIV. The court said "A system by which an inferior judge is paid for his services only when he convicts the defendant has not become so embedded by custom in the general practice, either at common law or in this country, that it can be regarded as due process of law, unless the costs usually imposed are so small that they may be properly ignored as within the maxim 'De minimus non curat lex.'" The Kentucky Court of Appeals stated that the facts of the principal case did not bring it within the exception quoted.

It seems that the holding of the United States Supreme Court in *Tumey* v. *Ohio*, supra, that such a practice is not "due process" is well sustained. Lord Coke said that even Parliament could not confer upon an individual the right of being a judge of his own case, and for that reason an act regulating the practice of medicine was void because it was "against common right and reason." Bonham's Case, (1610) 8 Coke 113 b, 77 Eng. Reprint 646. Lord Holt also affirmed the judgment of Lord Coke that an act which makes a person both a party and a judge is the same thing as to make him a judge of his own cause and

for that reason void. *London* v. *Wood*, (1702) 12 Mod. 669, 88 Eng. Reprint 1592. Though these cases were criticised and overruled by the later English decisions, it does not appear that they were overruled upon the doctrine here considered but rather upon the right of Parliament to change the common law. 40 Harvard Law Review 30.

At the time the Tumey Case was decided this practice was said to exist in Arkansas, Kentucky, Nebraska, North Carolina, Georgia, Ohio, and Texas. It also seemed to have prevailed at one time in Indiana, Oregon, Illinois, and Alabama. In the other states than those mentioned the inferior courts were paid for their services by the state and county regardless of acquittal or conviction. C. P. R.

COVENANTS—WHERE DEED CONTAINED ONLY COVENANT OF SPECIAL WARRANTY, NO OTHER WARRANTY COULD BE IMPLIED.—A conveyed "to B and her children," B conveyed to D the mineral rights and privileges. D in exchange of lands, mineral rights and privileges conveyed to P with a covenant of special warranty as had there-to-fore been agreed upon by D and P. After D had conveyed to P, B died. P had started to mine the coal when the children of B protested under claim of title and brought an action against P in which this court held: That B had received from A only a life estate, that the remainder in fee was vested in the children of B and that upon the termination of B's life estate P's interest also terminated. P in the present action tried to recover from D upon the covenant of special warranty and attempted to show an implied warranty which would render L liable under the present state of facts. Held for D, defendant. *Kentucky River Coal Corp.* v. *Swift Coal & Timber Co.*, 221 Ky. 593, 299 S. W. 201.

The rule has been handed down to us from the English courts and still followed in that country, that a covenant of special warranty is to protect the lessee against a claim of title from the lessor, but not against a claim under title against the lessor. *Stanley* v. *Hayes*, 3 Q. B. 105. Kentucky has adopted the rule both by statute and precedent. It is provided by section 493 of Carroll's Kentucky Statutes that a covenant of special warranty in a deed shall have the same effect "as if the grantor had covenanted that he, or his heirs and personal representatives, would forever warrant and defend the said property unto the grantee, his heirs, personal representatives and assigns, against the claims and of the grantor and all persons claiming or to claim by, through, or under him."

It has been held by Kentucky courts that by a covenant of special warranty the grantor undertakes to say no more than that he has legal title against the Commonwealth but refuses to guarantee that there is no adverse claim superior to his. *Arnold* v. *Maiden*, 5 Ky. Law Reports 334. No other covenants of warranty were implied. It has been held that there can be no implied covenant as to a matter specifically covered by express warranty in the instrument. *Kackelmacker* v. *Laird*, 92 Ohio State 324, 110 N. E. 933. It has also been held that im-

plied covenants are operative only when the parties have omitted to insert covenants in the instrument. *Weems* v. *McCoughan*, 7 S. & M. (Miss.) 422, 45 Am. Dec. 314. In the case at hand it was distinctly understood that there were to be covenants of special warranty and that each should have the privilege of examining the titles of the other before accepting any piece of property in the exchange which was to contain a covenant of special warranty. There was no fraud, but rather a mistake on the part of the counsel for the plaintiff in interpreting, "to B and her children." The holding seems to be in accord with the weight of authority and is certainly consistent with the statute above mentioned and with other cases previously decided in Kentucky.

R. B. B.

CRIMINAL LAW—ONE CHARGED WITH LIQUOR VIOLATION MAY GO BEHIND SEARCH WARRANT TO SHOW THAT KNOWLEDGE OF FACTS STATED IN AFFIDAVIT WAS OBTAINED BY ILLEGAL SEARCH.—A policeman entered the defendant's store for the expressed purpose of borrowing a hatchet. After procuring the hatchet the policeman went through the door into one of the vacant rooms without the defendant's knowledge or consent, and found a quantity of home brew. Instead of arresting the defendant at once, the policeman went before a notary and made an affidavit that he, "while standing in the building saw liquor upon the premises." Upon this affidavit the policeman obtained a search warrant and went back to the premises and found the home brew. Held, that the defendant might go behind the search warrant and affidavit for the purpose of showing that knowledge of facts stated in the affidavit was obtained by illegal search. *White* v. *Commonwealth, for Use and Benefit of the City of Middlesboro*, 221 Ky. 535, 299 S. W. 168.

A substantially similar case had been decided differently by the same court some three years earlier in *Reitzel* v. *Commonwealth*, 203 Ky. 186, 261 S. W. 1106. In the earlier case the court based its decision upon the rule that a defendant cannot go behind a search warrant regular and sufficient on its face to inquire whether facts stated in the affidavit for the warrant are true. In this later case the court professes to follow the same rule but states that the rule does not preclude a showing that knowledge of facts stated in the affidavit was obtained by illegal search. However the court does not seem to feel sure that the two cases are wholly reconcilable, for in this later case it says: "To the extent that *Reitzel* v. *Commonwealth* announces a contrary doctrine, it is hereby overruled." Nevertheless it is submitted that the two cases are clearly distinguishable. The affidavit in the earlier case stated an untruth whereas the affidavit in this later case states a half-truth. The difference in the facts invokes the distinction so often made between the admissiblity of contradictory evidence and explanatory evidence in analogous cases. In the earlier case the officer made affidavit that "while standing on side-walk immediately in front of the premises, he smelled unmistakable odors and fumes" of liquor coming

from the defendant's place. As a matter of fact he looked through a hole in the back fence and obtained his information. In this later case the officer states that "while standing in the building" he saw liquor. This statement is true as far as it goes, but it fails to state that the officer obtained this standing place in the building by a legal entrance. In the earlier case the method of obtaining the information necessarily involved the truth of the facts stated in the affidavit; in this later case the method of obtaining the information merely explains and enlarges upon the facts stated in the affidavit. The two cases are distinguishable on this ground.

It is clear that the motivating factor in the case at hand is the Kentucky rule as to admissability of evidence obtained by illegal search and seizure. This is obvious from the following sentence quoted from the opinion: "Manifestly, it is just as unlawful for an officer to make an illegal search of one's premises for the purpose of acquiring information of facts on which to base an affidavit as it is to make an illegal search for the purpose of obtaining evidence on which to base a conviction." The Kentucky court invariably has held that evidence obtained by illegal search and seizure is inadmissible. *Neal* v. *Commonwealth*, 203 Ky. 353, 262 S. W. 287. There are more than fifty Kentucky cases cited in the following annotations on the subject: 24 A. L. R. 1408; 32 A. L. R. 408; 41 A. L. R. 1145; 52 A. L. R. 477.

The rule that such evidence is inadmissible is not the majority rule, however. Only sixteen states favor inadmissability, whereas twenty-eight favor admissability, according to an extremely interesting summary published in the last issue of Case and Comment, volume 34, page 8. The federal courts, headed by the Supreme Court, hold such evidence inadmissable, as do Kentucky and the other fifteen states favoring the minority view. Indeed the tendency would seem to be toward the Kentucky rule because only one of the states favoring admissability has changed from an originally contrary view, while of the sixteen states favoring inadmissability only six of them were originally of that view. Nevertheless the mandates of both logic and law enforcement would appear to favor the majority rule, as Professor Harno has pointed out in 19 Illinois Law Review 303. At best the present case appears to be an unnecessary extension of an already doubtful rule.

G. R.

DEDICATION—"DEDICATION" IS DEVOTION OF LAND TO PUBLIC USE, INCLUDING USE FOR PUBLIC HIGHWAY.—Plaintiff, a firm of contractors, seeks to recover the cost of improvements of a street in the city of Lexington, duly authorized by said city, from the defendants, alleged owners of property abutting on said street, in the amount assessed by the city. Defendants refused to pay on the ground that they were not abutting property owners as there was a strip of land six feet wide to which another had title, between their property and the improved street. The question at issue was whether this six-foot strip had been

dedicated to the public use as a highway, or not. Prior to 1900, the plot of ground including the street and the defendants' lot was sold to a company which divided it up in smaller parcels and made a plat which it filed for record in the office of the county clerk. This plat did not show the street in question. A parcel of this land consisting of fifteen acres and containing the street, strip and lot in question came by mesne conveyance to another land company and later the whole property was annexed by legal means to the city of Lexington. Before 1900 a strip of land 66 feet wide had been fenced off, including the street and strip, but the plat filed by the last mentioned land company expressly reserved the six foot strip which it later conveyed to the present holder of the title. The evidence does not disclose who fenced in the sixty-six foot street, or that the then owner dedicated the strip to the use of the public, but the court presumes that the strip was dedicated from the fact that it was included in the land instead to be used as a street which was first accepted by the county and later annexed and improved by the city and concludes that the street was fenced off before the conveyance of the strip. Held; that judgment for the defendant should be reversed and judgment entered as prayed for in the petition. *W. T. Congleton & Co.* v. *Roberts et al.*, 221 Ky. 712, 299 S. W. 579.

From the report there is nothing to show who was the owner of the six foot strip of land in question at the time the street was fenced off and the only written evidence available was the deeds and plats. The street is not shown on the first plat and in the second it is expressly reserved from the street. Just who built the fence to open the road is not disclosed, or that these persons had title to the land so opened is also unknown, as stated in the opinion. To quote further, "Whether dedication of land to public use is made expressly, or by acts and conduct, intention to dedicate it must be clearly evidenced." Here the continued use of the property as a public road, the acceptance of it as shown by the county and city in repairing and keeping it up for a long term of years without objection from the owner, create a presumption of dedication. The dedication may be shown by the silence of the owner in face of known adverse possession by the public, or by any other act or omission from which the intention to dedicate may fairly be inferred. *Snouffer* v. *Cedar Rapids & M. City Ry Co.*, (1902), 118 Ia. 287, 92 N. W. 79. "When a landowner permits the general public to use a way over the land as a highway for a great length of time under a notorious claim of right, the law raises a conclusive presumption of dedication to the public use." *Riley* v. *Buchanan*, (1903), 116 Ky. 625, 3 Ann. Cases 788. G. L. B.

DEDICATION—EVIDENCE HELD TO SHOW ORAL DEDICATION OF A LOT AS PART OF A STREET IN SUBDIVISION.—Plaintiff asserts title to a small plot of ground within the city and seeks to enjoin the municipality from going upon and improving the lot as a city street. Evidence disclosed

that plaintiff's predecessor in title had caused a lot on a plat of a subdivision then just outside the town limits to be opened and used as a street as a matter of convenience. This was used by the public for more than twenty years as a street and was taken over and improved by the city at a later time. Sidewalks were laid and sewers installed. It was also shown that the use of the said lot saved plaintiff's predecessor a large sum of money as it was necessary for him to have a convenient outlet for his subdivision and that if this lot had not been used, he would have been compelled to buy other property at great expense, which was the incentive for the dedication of the land in question. Held, that this was a plain case of oral dedication by appellant's predecessor in title for purposes of his own, and that such acts by the city and public through a period of more than twenty years as were shown by the evidence were undeniably equivalent to an acceptance. *Central Land Co.* v. *Central City*, 222 Ky. 103, 300 S. W. 362.

"An intention to dedicate property to a public use must be clearly established, but such an intention may be shown by words, by deed, or by acts." *Cole et al.* v. *Minnesota Loan, etc., Co. et al.*, 17 N. D. 409. In the principal case the plaintiff tried to show that the city had accepted taxes on the lot in question and was therefore estopped from claiming title, but this contention was not supported by the evidence. While the lot in question did not appear on the plat filed as a street, the user by the public for more than twenty years and the taking over by the city with the improvements made, clearly showed a common law dedication by the owner and acceptance by the city. Once the street was dedicated and accepted, it became an appurtenance of all of the lots of the subdivision when these were sold and there was a complete and irrevocable dedication of the street, not only to the purchasers, but also to the public. *Rowan* v. *Portland*, 8 B. Monroe 232, *Schneider* v. *Jacob*, 86 Ky. 101, 5 S. W. 350. In the federal courts it has been held that if there has been no acceptance by the public of the dedication and no interest acquired by third persons, the dedication may be recalled by the owner, but if there has been such acceptance or if contracts have been made founded on such public appropriation, by third parties, the dedication becomes irrevocable. *Grogan* v. *Hayward*, 4 Fed. 161, 6 Sawy. 498. This doctrine is followed everywhere. G. L. B.

EJECTMENT—PLAINTIFF IN EJECTMENT MUST TRACE TITLE BACK TO COMMONWEALTH OR SHOW ADVERSE POSSESSION FOR THE STATUTORY PERIOD.—The plaintiff upon her failure to trace title back to the commonwealth, undertook to take advantage of the fact that the defendant, who was in possession, did not establish or try to establish title in himself. Held for defendant. *Ogle* v. *Cole*, 221 Ky. 726, 299 S. W. 566.

The courts of Kentucky have repeatedly held that the plaintiff in an action of ejectment must trace the title back to the commonwealth

or show an adverse possession for the statutory period in those under whom he claims.

To quote from a leading case: "The plaintiff in ejectment must recover on the strength of his own title, either by showing paper title back to the commonwealth or that he and those under whom he claims have been in possession of the lands by a continuous adverse possession for the statutory period next before the institution of the action." *Payne* v. *Edwards*, 210 Ky. 417, 276 S. W. 116.

The authorities are practically all in accord. This seems to be the most practical and most logical view in an action of ejectment. Possession gives rise to a presumption of right in the defendant and if the plaintiff can not rebut this presumption by showing a title back to the commonwealth in herself, or in those under whom she claims, as the law requires, then her cause should fail and the defendant should not be required to prove his own title. *Logan* v. *Williams*, 160 Ky. 641, 170 S. W. 22; *City and County of San Francisco* v. *Brown*, 153 Cal. 644, 96 Pac. 281; *Bursey* v. *Lyon*, 30 App. D. C. 597; *Skinner Mfg. Co.* v. *Wright*, 56 Fla. 561, 47 So. 931; *Spriggs* v. *Jamerson*, 115 Va. 250, 78 S. E. 571.

This rule does not apply however, when the plaintiff has been in possession and has been ousted by the defendant. The burden of establishing title rests on the defendant. *Witten* v. *St. Claire*, 277 W. Va. 762; *Hall* v. *Gallemore*, 138 Mo. 638; *Morrison* v. *Holder*, 414 Mass. 366; *McDermitt* v. *Forbes*, 69 W. V. 268. R. B. B.

HOMICIDE—ALTHOUGH DEFENDANT STARTED FIGHT, AS HE DID NOT USE DEADLY WEAPONS, NOR INTEND TO KILL NOR KNOW OF SUCH INTENTION BY OTHERS, HE WAS NOT GUILTY OF AIDING IN COMMITTING HOMICIDE.—Appellant caused a fight by driving too close to the deceased. Several of appellant's friends who happened to be on the spot at the time engaged in a fight as well as several friends of the deceased. Appellant was knocked down at the beginning of the fight when he stepped from his car, and he testified that he did not again regain consciousness until it was over. Testimony of witnesses tended to corroborate his contention. Held, that if it should be admitted that appellant started the fight, using no deadly weapons, and without any intention on his part to bring about the bloody tragedy or without any knowledge on his part that any of the others participating with him had any such intention, it could not be said that he was aiding or abetting in the commission of the felony and the jury should have been so instructed. *Warren* v. *Commonwealth*, 222 Ky. 460, 1 S. W. (2d.) 774.

It has been held repeatedly in Kentucky, that a person can not be convicted as an aider and abettor in a felony, unless at the time he participated, he knew of the felonious intentions of his accomplices, and with that knowledge aided and abetted them or himself had such intention. *Anderson* v. *Commonwealth*, 193 Ky. 663, 237 S. W. 45; *Bradley* v. *Commonwealth*, 201 Ky. 663, 257 S. W. 11; *Powers* v. *Com-*

monwealth, 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 53 L. R. A. 245; *Omer* v. *Commonwealth*, 995 Ky. 353, 25 S. W. 594. In the latter case, it was held prejudicial error on the part of the court to instruct that defendant could be convicted if he had knowledge of the killing, while in the presence of the party who did the killing.

It has been held that mere presence and participation in the act of killing are not conclusive evidence of consent and concurrence in the perpetration of the act. *Brooks* v. *State*, 128 Ga. 261, 57 S. E. 483, 12 L. R. A. (N. S.) 889. Where a homicide is committed by a third person growing out of an altercation between accused and deceased, unless there is some conspiracy or previous design to kill between accused and such third person, the accused is not guilty of felonious homicide. *People* v. *Elder*, 100 Mich. 515, 59 N. W. 237; *Tuner* v. *State*, 97 Ala. 57, 12 So. 54; *Abata* v. *State* (Texas Crim. App.) 102 S. W. 1125.

Criminal responsibility for acts of others done in the prosecution of an unlawful project is subject to the limitation that the particular act of one of a party, for which the associates and confederates are to be held liable, must be shown to have been done for the furtherance or in prosecution of the common object and design for which they combined together. *Williams* v. *State*, 81 Ala. 1, 1 So. Rep. 179; *Powers* v. *Commonwealth*, 110 Ky. 386, 61 S. W. 735; *People* v. *Friedman*, 205 N. Y. 161, 98 N. E. 471, 45 L. R. A. (N. S.) 55.

Under the law as given in the court's holding in the present case, appellant was undoubtedly innocent of criminal homicide. It is submitted by the court that admitting the appellant started the fight, yet if he had not intended to commit felony or that he had knowledge of any such intent by those participating, he should not be held guilty. The evidence would tend to show that appellant, although he was the cause of the fight, did not start it; but was knocked down and remained unconscious throughout. He was entirely innocent of what was taking place and in the light of the evidence it was clearly error on the part of the trial court in refusing the instructions asked.

H. C. C.

INSURANCE—POLICY COVERING TOTAL ILLNESS DISABILITY, PREVENTING ASSURED FROM PERFORMING DUTIES PERTAINING TO "HIS OCCUPATION," PRECLUDED CREDIT FOR EARNINGS IN ANOTHER BUSINESS WHILE SO DISABLED.—Defendant insurance company issued plaintiff a policy insuring him against "Total illness disability that continuously prevents the assured . . . from performing each and every duty pertaining to his occupation." His occupation was that of retail groceryman. During the term of the policy he developed tuberculosis. He sold his store and quit business, as his health was such that he was unable to perform the duties pertaining to his occupation. For four years he lived on a farm doing nothing. The company paid him for

total disability for these four years. He then moved to town and the company refused to pay him any longer. Thereupon plaintiff brought this action. Defendant company claimed that for sometime plaintiff had been engaged in other business than that of a groceryman and asked that if it were held liable, it be given credit for amounts earned by the plaintiff. Evidence showed plaintiff's total inability to carry on the business of retail groceryman, but there was some evidence tending to show he could to some extent carry on the business of buying and selling real estate. Held: That the policy insured him against disability to perform duties pertaining to the occupation of retail groceryman only, so that insurer was not entitled to credit for amounts earned in another business while disabled to follow stated occupation. *Fidelity & Casualty Co. of New York* v. *Bynum*, 221 Ky. 450, 298 S. W. 1080.

The principal case turned on whether under the policy the defendant insurance company insured plaintiff against total disability to carry on the business of a retail groceryman or whether it only insured him against total disability to carry on any business in which he might be engaged during the time sued for. In *National Life & Accident Insurance Company.* v. *O'Brien*, 155 Ky. 498, 155 S. W. 1134, the insurance was of a disability which prevented the insured from performing every duty pertaining to any business or occupation. In *Hagman* v. *Equitable Life Assurance Society*, 214 Ky. 56, 282 S. W. 1112, the disability insured against existed if the insured was permanently unable to engage in any occupation or perform any work for compensation of financial value. There are many like cases, in all of which it has been held that the thing insured against was a disability to work in any occupation. *Bellows* v. *Travelers Insurance Company*, 203 S. W. (Mo.) 978; *Clarke* v. *Travelers Insurance Company*, 94 Vt. 383, 111 Atl. 449.

There are no such provisions in the policy in the principal case. In this policy the thing insured against is total illness disability that continuously prevents the assured from performing each and every duty pertaining to his occupation. His occupation is stated to be that of a retail groceryman. So that by the very terms of the policy the disability insured against is a disability to perform each and every duty pertaining to his occupation as a retail groceryman. A thorough search of the books has failed to reveal any case on all fours with the one at hand. The question whether there is a total disability when the insured, notwithstanding his injury or disease, is able to work in other occupations, depends largely on the terms of the contract defining the disability. It is submitted that the wording of the policy is conclusive that the defendant insured plaintiff against disability to perform duties pertaining to the occupation of retail groceryman only and that the court correctly held that defendant was not entitled to credit for amounts earned by plaintiff in another business. R. R. R.

LANDLORD AND TENANT—LANDLORD IS LIABLE FOR DAMAGES PRODUCED BY LATENT DEFECTS, KNOWN TO HIM, BUT UNKNOWN TO TENANT.—Appellee lived with her husband in their apartment which they rented of the appellant in his tenement house. There was no water in their apartment but appellant had provided a washroom in the rear thereof from which appellees got their water. There was a sink and a water pipe in the washroom, running up through the floor from the ground, about three and a half feet above the surface. Above this, the pipe which led to a boiler, had been disconnected and a wooden plug inserted. The weather being extremely cold the faucet froze although the water was turned off from the pipe. When appellee turned the water on by means of the wrench so provided, the faucet being frozen increased the pressure and forced the plug out of the pipe, which struck the appellee and injured her severely. Held: If latent and hidden defects existed as to the property which were known to or could have been known to the landlord through the exercise of ordinary care, and which were unknown to the tenant, then the lessor would be liable for any damages produced thereby. *Consolidation Coal Co.* v. *Zaris*, 222 Ky. 238, 300 S. W. 615.

The law imposes a liability where the landlord releases the entire possession to the renter and does not re-enter, but the premises were in a defective or dangerous condition when leased; this fact being known to the lessor, and not known to nor reasonably discoverable by the lessee, the former concealing the true condition from the latter. 56 Central Law Journal 226. The rule has most frequently been applied to defects in portions of the premises which the tenant would not be likely to and did not discover; to cases of defective sidewalks, *Laydecker* v. *Brintnall*, 158 Mass., 381, 33 N. E. 399; vaults, *Coke* v. *Gutkese*, 80 Ky. 598; *Martin* v. *Richards*, 155 Mass. 381, 29 N. E. 591; and cesspools, *Cowen* v. *Sunderland*, 145 Mass. 363, 14 N. E. 591, because while no responsibility arises out of a contract express or implied there is a strict common law liability for a tort, in using the property in a harmful way, and an application is made of the maxim *sic utere tuo in alienum non laedas*. *Kern* v. *Myell*, 80 Mich., 528, 8 L. R. A. 682, 45 N. W. 587. The owner of the premises upon which is situated a structure or building dangerous in its condition, and which is known to the owner cannot escape liability to a tenant from whom he conceals such defect or a member of his family, who, not knowing of such defect, and while in the exercise of ordinary care, is injured by the falling of such building or structure, *Moore* v. *Parkes*, 63 Kas. 52, 53 L. R. A. 778. The question arises whether the landlord must actually know of the defects and dangerous conditions existing when he leases the premises. The better rule is that his knowledge may be actual or constructive, and the latter arises where he fails to make reasonable investigation, *Hines* v. *Wilcox*, 96 Tenn. 148, 33 S. W. 914, 34 L. R. A. 824.

Where there was an injury to the tenant's daughter and it appeared that the landlord knew of the dangerous condition of a portion of the premises which would be frequently used by the tenant and his family,

and failed to disclose the condition to the tenant, although it was so situated as not to be readily discernible by them, the Kentucky rule is that because of the failure to disclose the landlord is liable. *Coke* v. *Sutkese*, 80 Ky. 598, 44 Am. Rep. 490. A. K. R.

LANDLORD AND TENANT—LANDLORD RETAINING POSSESSION OF PORTION OF DEMISED PREMISES FOR USE OF NUMBER OF TENANTS MUST MAINTAIN RETAINED PORTION IN REASONABLY SAFE CONDITION.—The appellant was a member of a household which had rented premises from the defendant. The premises, a house and yard, was one of several tenant houses, erected for the use of the employees of the defendant mining company. The defendant had also sunk and maintained a well for the use and enjoyment of all of the tenants located in that section of houses. The pump of the well in question was in a defective condition and the appellant was painfully injured while using it. She thereupon brought this action for damages. Held, that the landlord was bound to maintain the premises retained under these circumstances in a reasonably safe condition. *Richmond* v. *Standard Elkhorn Coal Co.* 222 Ky. 150, 300 S. W. 359.

A distinction is made as to the landlord's duty of maintaining the premises when the tenant has the exclusive possession, *Franklin* v. *Tracy*, 117 Ky. 267, 77 S. W. 1112; and where the landlord retains a portion of the premises demised for the common use and benefit of other tenants occupying separate premises. In the latter instance the law imposes upon him the duty of maintaining the premises in a reasonably safe condition and if he is negligent in this respect and injury results to the tenant therefrom, he is liable. *Looney* v. *McLean*, 129 Mass. 33, 37 Am. Rep. 295. The reason of relieving the landlord in the former instance e. g. when the tenant has the exclusive possession is that he would be guilty of a trespass should he enter for the purpose of making repairs. *Green v. Hammock*, 13 Ky. Law Rep. 145, 16 S. W. 357. By reason of this the tenant is relieved of any duty to the landlord and his agents the same as he is to any other trespassers, and if the landlord sends his agent on the premises to repair the same and he is injured while thus engaged, he cannot recover from the tenant. *J. D. Forsythe* v. *Shryock-Thom Grocery Co.*, 283 Mo. 49, 223 S. W. 39.

As the doctrine of *res ipsa loquitur* is predicated upon the idea that the accident complained of does not happen in the usual course of events if those who have the management of the instrumentality causing the injury use proper care, *Scott* v. *London Dock Co.*, 2 H. & C. 596; its application in this situation depends upon whether the defective apparatus was under the exclusive control of the landlord, *Powers* v. *Rex Coal Co. et al* 207 Ky. 761, 270 S. W. 28, or whether the control was shared by both the landlord and the tenant, *White* v. *Spreckles*, 10 Cal. App. 287, 101 Pac. 920, 21 Am. Neg. Rep. 29.

The rule of the principal case establishing the landlord's liability for injuries to the tenant, arising from the maintenance of defective

apparatus installed for the enjoyment of several tenants, is in accord with that which prevails in the majority of jurisdictions. *Indianapolis Abattoir Co.* v. *Temperly*, 159 Ind. 651, 95 Am. St. Rep. 330, 64 N. E. 906; *Queeney* v. *Willi*, 225 N. Y. 374, 122 N. E. 198; Tiffany Real Property, section 51. C. P. R.

LIBEL AND SLANDER—FALSE CHARGE TO EFFECT THAT JUDGE ABANDONS OFFICE AND TAKES UP ROLE OF PROSECUTOR IS LIBELOUS.—The appellants published in newspapers having a wide circulation throughout the state statements to the effect that in a noted rape case the judge was busying himself with the prosecution, that the defendants were to be swiftly convicted and hanged regardless of the circumstances, that they were being rushed to the gallows by a farcial trial, that the judge's trial was an exercise of mob law, and that he had not given a thought to the presumption of innocence that the law throws around the accused. Held, such charges are charges of a want of integrity on the part of the trial judge, and are therefore libelous. *Cole* v. *Commonwealth, Warley v. Same, Louisville News Co.* v. *Same.* 222 Ky. 350, 300 S. W. 907.

The interest of society requires that immunity should be granted to the discussion of public affairs and that all acts and matters of a public nature may be freely discussed with fitting comments or strictures. *Democratic Publishing Co.* v. *Harvey*, 181 Ky. 730, 205 W. S. 903. It has been held that fair comment on such matters is a public right. *Van Lankhuyzen* v. *Daily News Co.* 203 Mich. 570, 170 N. W. 93. Individuals have this right the same as newspapers and publishers. *Patten* v. *Harper's Weekly Corp.* 93 Misc. 368, 158 N. Y. S. 70. On the other hand, newspapers have no special privilege. *Morse* v. *Times-Republican Printing Co.* 124 Ia. 707, 100 N. W. 867; *Williams* v. *Beach*, 24 S. D. 501, 124 N. W. 728.

The recognition of the right to publish proceedings of the courts of justice is of modern growth. *McBee* v. *Fulton*, 47 Md. 403, 28 Am. R. 465; *American Publishing Co.* v. *Gamble*, 115 Tenn. 663, 90 S. W. 1005; *Wason* v. *Walter*, L. R. 4 Q. B. 73. Both at common law, *Lee* v. *Brooklyn Union Publishing Co.* 209 N. Y. 245, 103 N. E. 155 and in most jurisdictions by statute a full, fair and impartial report is qualifiedly privileged. *Conklin* v. *Augusta Pub. Co.* 276 Fed. 288.

While Kentucky has no statute as above it is held that newspapers are not held to exact facts, and truth constitutes a complete defense, although the publication was inspired by malice, and although the report contains matter that would otherwise be defamatory and actionable. *Plummer* v. *Commercial Tribune Co.* 208 Ky. 215, 270 S. W. 793.

Where one exercises the citizen's right to denounce the action of a public officer it is unlawful for him to make a false and malicious charge of crime or misdemeanor in office. *Rowland* v. *De Camp*, 96 Pa. 493.

An article in a newspaper charging a public officer with gross misconduct in office is not privileged on the ground of its publication being a public good. *Boureseau* v. *Detroit Evening Journal*, 63 Mich. 425, 30 N. W. 376, 6 Am. St. Rep. 320. A newspaper proprietor has no greater right to comment on the conduct of a public officer than an individual, so held in *Gazette Co.* v. *Bishop*, 6 Ohio, Dec. 1113.

Thus it is seen that by both the common law and by statute accurate and just criticism of public officers is protected, but such criticism must be founded on truth. A. K. R.

LIMITATIONS OF ACTIONS—ACTION BY MARRIED WOMAN FOR PERSONAL INJURIES SUSTAINED AFTER MARRIAGE HELD NOT BARRED BY ONE YEAR STATUTE OF LIMITATIONS.—Appellant was riding as a passenger in an automobile, when the defendant negligently and carelessly ran its wagon and team into the automobile in which she was riding thereby injuring her. Appellant was a married woman. This action having been brought more than one year after the accident occurred, defendant pleads the one year statute of limitation under section 2516 of the Kentucky Statutes. Held, that the action was not barred by section 2516 of the Kentucky Statutes, in view of section 2525, since, being under disability, she could bring it at any time within one year after removal of such disability. *Dowell* v. *Gray Von Allman Sanitary Milk Co.*, 221 Ky. 780, 299 S. W. 956.

This same question was before the court in *City of Ludlow* v. *Gorth*, 214 Ky. 833, 284 S. W. 84, which was also an action for personal injury. The court held, that since the plaintiff was laboring under a disability, being a married woman, she was, therefore, entitled to bring her action at any time within one year after the removal of her disability. An action for damages to the property of a married woman sustained by her by the operation of railroad trains on the street in front of her property is not barred until the lapse of five years after she becomes discovert. *Onions* v. *Covington & Cincinnati El. R. R. Co.*, 107 Ky. 154, 53 S. W. 8. The statute of limitations does not run against a married woman during coverture. This is clearly the law in Kentucky as indicated by the following cases: *Peters* v. *Noble*, 196 Ky. 123, 244 S. W. 416; *Sullivan* v. *Bland*, 215 Ky. 57, 284 S. W. 410; *Duvall* v. *Parepoint, et al.* 168 Ky. 11, 181 S. W. 653; *Dukes* v. *Davis*, 125 Ky. 313, 101 S. W. 390; *Sturgill* v. *C. & O. Ry.*, 116 Ky. 659, 76 S. W. 826; *Henson, et al* v. *Culp*, 157 Ky. 442, 163 S. W. 455; *Smith* v. *Cox's Committee*, 156 Ky. 118, 160 S. W. 786.

We find courts in other jurisdictions holding in accord with the principal case. Statutes enlarging the rights of married women have been held not to repeal by implication exceptions in their favor in the Statutes of Limitations. *Lindell Real Estate Co.* v. *Lindell*, 142 Mo. 61, 43 S. W. 368; *Carey* v. *Paterson*, 47 N. J. L. 365, 1 Atl. 473; *Memphis & L. R. R. Co.* v. *Organ*, 67 Ark. 84, 55 S. W. 952.

In many jurisdictions where acts have been passed removing the disabilities of married women a contrary result has been reached. In *Hayward* v. *Gunn*, 82 Ill. 385, the court said: "The act of 1861, in vesting married women with the sole control of their separate property, was, as to such property, to place them in precisely the same position, so far as the statutes of limitations are concerned, that they would occupy as femes sole. When the reason ceases, the law ceases. The exception in favor of married women, in the old statutes of limitations, was because of their disability to sue without the consent of their husbands and the joining of their names. That being removed by this act, a married woman should be held to the same promptness, in the assertion of her rights, as any other property holder laboring under no legal disability." Coveture is no longer a legal disability in New York. *Acker* v. *Acker et al.*, 81 N. Y. 143. Coveture as a disability has been entirely destroyed by statute and no longer exists as a bar to any statute of limitations. *Butler* v. *Bell*, 181 N. C. 85, 106 S. E. 217; *Nissley* v. *Brubaker*, 192 Pa. 388, 43 Atl. 967; *Douglass* v. *Douglass*, 72 Mich. 86, 40 N. W. 177. Coveture is no longer a full legal disability under the existing statutes of Indiana. *Rosa* v. *Prather*, 103 Ind. 191, 2 N. E. 575. The statute of limitations runs against a married woman in all actions to which her husband is not a necessary party plaintiff with her. *Wilson* v. *Wilson*, 36 Cal. 447, 95 Am. Dec. 194.

In *Percy* v. *Cockrill*, 53 Fed. 872, the federal court was governed by Arkansas decisions applying the Arkansas statute. It would seem that the federal courts follow the decisions of the highest judicial tribunal of the state enacting such statutes.

On the question presented, whether statutes enlarging the rights of married women, which includes the so-called Married Women's Acts, conferring on married women certain rights of property and of action, have repealed by implication the exception commonly found in Statutes of Limitations in their favor, the authorities are in hopeless conflict, due in part to differences in statutes, but chiefly, it appears, to differences as to the interpretation and purpose of the exception in the Statutes of Limitations in favor of married women. It seems there is a clear trend in recent decisions by a majority of the jurisdictions in favor of doctrine of implied repeal by such statutes of the saving clause in favor of married women in the Statutes of Limitations. Kentucky, however, is in accord with the minority view. B. C.

MASTER AND SERVANT—EMPLOYER HELD NOT LIABLE FOR EMPLOYEE'S NEGLIGENCE WHEN NOT DRIVING ON OWN ERRAND NOTWITHSTANDING EMPLOYEE HAD NO LICENSE.—An employee of the defendant drove an automobile, which was used for the convenience of the business, to his home, two blocks away, intending to stop on his way back and get some articles for the firm. He was a competent and experienced driver and decided to drive out in the country about three miles and get an acquaintance. After he had gone about two miles the accident occured

for which the defendant is sued. Held: The employee was not within the scope of his employment and defendant is not liable. (Ky. St. Secs. 2729g1 (c), 2729g15). *Winslow* v. *Everson*, 221, Ky. 430, 298 S. W. 1084.

In the absence of a statute this case would fall within the clearly defined principle of agency, which the courts have followed almost universally, that a principal is not liable for acts of his agent done without the scope of his employment. *Eakins* v. *Anderson*, 169 Ky. 1, 183 S. W. 217; *Wyatt* v. *Hodson*, 210 Ky. 47, 275 S. W. 47; *Slater* v. *Advance Thresher Co.*, 97 Minn., 305, 107 N. W. 133; *Stewart* v. *Barauch*, 93 N. Y. S. 161, 103 App. Div. 577.

Ky. Statutes Sec. 2739g15 says, "before any *chauffeur* shall operate or drive an automobile on the highway" or before any person or firm shall hire him he must have a *chauffeur's* license. Section 2729gi (c) defines a chauffeur as, "one whose business or occupation, in whole or in part, is the operation of an automobile for, compensation, wages, or hire." Under these statutes it was contended that the defendant was committing a misdemeanor by knowingly allowing the employee to drive his automobile without a license and should therefore be held liable even though the employee was not acting within the scope of his employment at the time of the accident. This contention finds support in the doctrine, which the courts now regard as unsound and untenable, that an automobile is a dangerous instrumentality *per se*, and therefore should not be intrusted to one known to be incompetent, to control it, *Keck's Admr.* v. *The Gas and Electric Co.*, 179 Ky. 317; *Tyler* v. *Stephen's Admr.*, 163 Ky. 780. But even this contention is not applicable to this case because the employee was shown to be an experienced and competent driver. The court further concluded that the employee was not a *chauffeur* within the intendment of the above statute and therefore could not be operating an automobile contrary to its provisions. The case then must rest upon the principle of "principal and agent" and consequently is in accord with the overwhelming weight of authority. J. C. B.

NEGLIGENCE—DEFENDANT, SHOWING INTOXICATION, HELD ENTITLED TO INSTRUCTION THAT "ORDINARY CARE" MEANS CARE WHICH ORDINARILY PRUDENT PERSONS, IF SOBER, EXERCISE UNDER SIMILAR CIRCUMSTANCES.—Appellee's decedent was killed by a motor truck owned and operated by appellant while attempting to cross the railroad track upon which the truck was being operated. In an action for negligence the defense was interposed that the decedent was intoxicated, which caused him to be contributorily negligent. Held, that the appellant was entitled to instructions defining ordinary care as care which ordinarily prudent persons, if sober, exercise under similar circumstances. *Black Star Coal Co.* v. *Slusher's Adm'r.*, 221 Ky. 729, 299 S. W. 732.

The rule as laid down by the court in the instant case is of unquestioned authority in Kentucky. *Illinois Central R. Co.* v. *Holland's*

Adm'r., 147 Ky. 699, 145 S. W. 389; *Graham's Adm'r.* v. *Illinois Central R. Co.*, 185 Ky. 370, 215 S. W. 60; *L. & N. R. Co.* v. *Howser's Adm'r.*, 201 Ky. 548, 257 S. W. 1010.

That an intoxicated person will be held to the same degree of care which would be required of an ordinarily prudent sober person seems generally accepted in all jurisdictions. *Chicago, R. I. & P. R. Co.* v. *Bell*, 70 Ill. 102; *Brand* v. *Schenectady & T. R. Co.*, 8 Barb. (N. Y.) 368; *Denman* v. *St. Paul & D. R. Co.*, 26 Minn. 357, 4 N. W. 605.

However, the intoxication of the injured person of itself will not prevent a recovery. *L. & N. R. Co.* v. *Cummins*, 111 Ky. 333, 63 S. W. 594; *Kansas City Southern R. Co.* v. *Davis*, 83 Ark. 217, 103 S. W. 603. The question to be determined is not whether the party was intoxicated, but whether or not he exercised ordinary care. *Lawson* v. *Seattle & R. R. Co.*, 34 Wash. 500, 76 Pac. 71, 16 Am. Neg. Rep. 253.

Thus it has been held that it is not negligence per se for an intoxicated person to attempt to cross a railroad track. *Morgan* v. *C. & O. R. Co.*, 176 Ky. 409, 195 S. W. 809; *Ward* v. *Chicago, St. Paul & M. R. Co.*, 85 Wis. 601, 55 N. W. 771. It is merely a circumstance which is to be considered in determining the question of contributory negligence. *Louisville & N. R. Co.* v. *Howser's Adm'r*, supra; *Shelley* v. *Brunswick Traction Co.*, 65 N. J. Law 639, 48 Atl. 562.

The intoxication must contribute to the injury, but all the circumstances of the case will be taken into account in so determining. *Marquette, H. & O. R. Co.* v. *Hanford*, 39 Mich. 537, *Morgan* v. *C. & O. R. Co.*, supra.

Thus it may be said that the standard of care is always that of the ordinarily prudent, sober man. Intoxication places an added burden upon a person to use such care, and is never an excuse or extenuating circumstance for failure to use it. But if such care is used in spite of such intoxication, then recovery is not barred. This seems the universal rule. W. C. S.

SPECIFIC PERFORMANCE—COMPLAINANT FOR SPECIFIC PERFORMANCE, ASKING JUDGMENT AGAINST HUSBAND FOR VALUE OF WIFE'S DOWER ON HER REFUSAL TO JOIN CONVEYANCE HELD, STATED CAUSE OF ACTION—Appellant contracted with the husband to purchase certain lots for $2,250 cash. The husband accepted the proposition by written endorsement, but his wife never signed nor became a party to the contract. The husband and wife had a deed prepared, but for some unknown reason, never had it acknowledged and refused to go further, when appellant tendered payment. Thereupon appellant began his suit for specific performance, and on final adjudication the court held, that appellant had stated a cause of action in specific performance, after alleging refusal of the vendor's wife to join in the conveyance, and by praying for judgment against the vendor for the value of his wife's dower interest. *Will B. Miller Company* v. *Bannon*, 221 Ky. 677, 299 S. W. 567.

It does not appear that abatement of a wife's dower interest from the purchase price in the specific enforcement of a contract to convey

land in which the wife refuses to join her husband, has been before the Court of Appeals at any previous time. The court cites no authority. It has been held that where the wife did not sign the contract, that specific performance would be decreed because the vendor had sufficient other real estate out of which dower could be assigned. *Bartley* v. *Big Branch Coal Co.*, 160 Ky. 123, 169 S. W. 601.

There is a conflict of authority as to whether abatement of the wife's dower interest in such a case should be decreed. Since the husband has not obtained his wife's joinder in the deed, and she can not be compelled to join, the price of her dower interest should be deducted from the purchase price. *Noeker* v. *Wallingford*, 133 Ia. 605, 111 N. W. 37; *Wanamaker* v. *Brown*, 77 S. C. 64, 57 S. E. 665; *Martin* v. *Merrit*, 51 Ind. 34, 26 Am. Dec. 45; *Springle* v. *Shields*, 17 Ala. 295. But specific performance of a written contract to sell land in such a case will not be decreed where fraud in the vendor is not shown in the refusal of the wife, unless the vendee will pay the full purchase price and accept a deed signed by the husband alone. *Aiple-Hemmelmann Real Estate Co.* v. *Spelbrink*, 211 Mo. 671, 111 S. W. 480, 14 Am. Case 652; Burk's App. 75 Pa. 141, 15 Am. Rep. 587; *Bateman* v. *Riley*, 72 N. J. Eq. 316, 73 Atl. 1006; *Traylitt* v. *Burgh*, 89 Va. 895, 21 L. R. A. 133, 37 Am. St. Rep. 894.

The objection to an abatement of the purchase price for the wife's dower interest, as stated by the Federal Court is, that to ascertain the value of such contingent right of dower would necessarily involve a controverted question of fact—a question that would likely illicit a variety of opinion and judgment, and when determined it would not be the agreement of the parties, but a distinct term introduced into the contract. To do this would be simply modifying the contract, and decreeing specific performance as modified. *Barber* v. *Hickey*, 2 App. Cas. (D. C.) 207, 24 L. R. A. 763.

Conceding that the terms of the contract are altered as pointed out by the Federal Court, and the vendee still wishes to go ahead with the contract, it does not appear that any injustice would result. It is the vendor's fault in not procuring his wife's consent, and the Court of Appeals should be justified in its decision. H. C. C.

TORTS—PETITION ALLEGING PUBLICATION OF NOTICE RESPECTING PLAINTIFF'S INDEBTEDNESS HELD TO STATE CAUSE OF ACTION FOR INVASION OF RIGHT OF PRIVACY.—Appellant, a garage owner, caused to be placed upon his show window a conspicuous notice to the effect that appellee owed him a sum of money, which he had promised to pay time and again, and had failed to do so. Appellee brought this action, alleging that by reason of appellant's publication of said notice he had been exposed to public contempt, ridicule, aversion, and disgrace. There was no allegation that the matter set forth in the petition was false. Held, that appellee stated a good cause of action in tort for unwarranted invasion of his right of privacy. *Brents* v. *Morgan*, 221 Ky. 765, 299 S. W. 967.

The right of privacy, or the right of a person to be free from unwarranted publicity is a new branch of the law, developed in comparatively recent years. See 4 Harvard Law Review 193. In Kentucky the doctrine was first referred to in *Grigsby* v. *Breckinridge*, 2 Bush (Ky.) 480, 92 Am. Dec. 509. The action there was for publication of the plaintiff's letters to his wife, then dead. Although the basis for the decision was the violation of a property right in the letters, the doctrine of the right of privacy was discussed in a dissenting opinion by Williams, J. Since that time there has been a development of the law in Kentucky, leading to the decision in the instant case. In *Foster-Milburn Co.* v. *Chinn*, 134 Ky. 424, 120 S. W. 364, 34 L. R. A. (N. S.) 1137, the court held the publication of a photograph without the owner's consent to be an invasion of the right of privacy and actionable. The decision was followed in *Douglas* v. *Stokes*, 149 Ky. 506, 149 S. W. 849, 42 L. R. A. (N. S.) 386, upon substantially the same facts. In both cases the court declined to put their decision upon the violation of a property right in the photographs.

The courts as a whole, however, are loath to accept the doctrine of the right of privacy, adhering to the view that the legislatures and not the courts must provide a remedy for the invasion of such a right. *Henry* v. *Cherry*, 30 R. I. 13, 73 Atl. 97; *Roberson* v. *Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442. These courts take the view that the law cannot undertake to remedy a sentimental injury, and is not concerned with the feelings of a person unless the suffering and discomfort are connected with the possession and enjoyment of property. *Atkinson* v. *Doherty*, 121 Mich. 372, 80 N. W. 285.

A number of jurisdictions have accepted the doctrine, and the courts adhering to it recognize the existence of the rights as incident to the person, scouting the idea of a necessity for the existence of a property right. *Pavesich* v. *New England L. Ins. Co.*, 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101; *Itzkovitch* v. *Whitaker*, 115 La. 479, 39 So. 499, 1 L. R. A. (N. S.) 1147. The view is expressed that the right of privacy is a natural right, which every human being had in his natural state, and which he did not surrender by becoming a member of organized society. *Pavesich* v. *New England Mutual L. Ins. Co.*, supra.

It is significant to note that in the instant case the rule is expressly laid down that the allegation of the truth of the matter published constitutes no defense to an action for the invasion of the right of privacy. The trial court sustained a demurrer to the paragraph of appellant's answer alleging truth as a defense, and this was sustained by the upper court. Had the appellee brought his action in libel he would undoubtedly have lost, for truth is a complete defense. Kentucky Civil Code, Section 124; *Courier-Journal Co.* v. *Phillips*, 142 Ky. 372, 134 S. W. 446. The complete defense which truth constitutes in an action of libel is thus made statutory in Kentucky, and thus the decision in the instant case is an especially strong one, and establishes beyond all doubt the existence of a right of privacy, and the determination of the Kentucky

courts to vigilantly guard such a right. No other jurisdiction, even though recognizing the right, seems to have gone so far. W. C. S.

WILLS—TO CREATE A PRECATORY TRUST TESTATOR MUST POINT OUT CLEARLY AND CERTAINLY SUBJECT-MATTER OF TRUST.—Appellee claimed that testator in his lifetime had made him a present of a certificate of deposit in the sum of $19,200. In the settlement of the testator's estate, it became necessary for appellee to prove his claim. As he was incompetent as a witness on the ground of interest, he sought to prove it by A, who had issued the certificate at the request of testator, and who was present when testator handed it to appellee with the request that appellee take care of A out of it. It was contended that A was an incompetent witness as he was interested in the outcome of the case. Held, that A had no such interest as would disqualify him as a witness. That, even if testator had bequeathed this certificate of deposit to appellee with such a request that appellee look after A, the request would not have amounted to a precatory trust. *Thevathan's Executor* v. *Dee's Executors et al.*, 221 Ky. 396, 298 S. W. 975.

No trust is created by precatory words when the language of the will clearly shows none was intended. Testator's will in favor of his wife reading that he requested the wife to arrange at her death that any property passing to her under the will should be divided into equal parts to be given to certain individuals with declaration that it was only a request on his part which in no wise should be construed as meaning that he was placing any limitations on the right of the wife, held not to have created a precatory trust in favor of the individuals named. *Gross* v. *Smart*, 189 Ky. 338, 224 S. W. 871. In order to create a precatory trust, the testator must point out with sufficient clearness and certainty, among other things, the subject-matter of the intended trust. *Wood* v. *Wood*, 127 Ky. 514, 106 S. W. 226. Where words are used in a will making a request, but without intending to create a trust, such words are held not to create a precatory trust. *Enders* v. *Tasco*, 89 Ky. 17, 11 S. W. 818; *Sale* v. *Thornsberry*, 86 Ky. 266, 5 S. W. 468; *Igo* v. *Irvine*, 24 Ky. Law Rep. 1165, 70 S. W. 836.

This same doctrine prevails in other jurisdictions. Precatory words which follow an absolute devise are usually treated as expressions of wish rather than of will, so that no trust is created. In *Hess* v. *Singer*, 114 Mass. 56, Judge Gray rendering the opinion of the court, said: "In order to create a trust, it must appear that the words were intended by the testator to be imperative; and when property is given absolutely and without restriction, a trust is not to be lightly imposed, upon mere words of recommendation and confidence." This same rule is quoted with approval in *Bloom* v. *Strauss*, 73 Ark. 56, 84 S. W. 511, and in *Colton* v. *Colton*, 127 U. S. 300. Precatory or commendatory words must be essentially imperative in their character in order to create a trust. *Bristol* v. *Austin*, 40 Conn. 438. Words in a will expressive of desire, recommendation, and confidence are not words of

technical but of common parlance, and are not prima facie sufficient to convert a devise or bequest into a trust. In re Pennock, 2 Pa. St. 268, 59 Am. Dec. 718. In *Bryan* v. *Milby*, 6 Del. Ch. 208, 24 Atl. 333, testator devised his whole estate to his wife, and requested that, if she should not require the whole of the estate as a support, she would will the remainder at her death to the children of the testator's brother, held, there being no certainty as to the existence of a remainder, that no precatory trust arose in favor of the children. In *Wilmoth* v. *Wilmoth*, 34 W. Va. 426, 12 S. E. 731, the court held where a will gave to testator's wife all his personalty, "to be hers absolutely, to be used by her in any way or manner she may wish for her own comfort and for the comfort and benefit of our two children," that such words did not create an implied or precatory trust in favor of the children.

In *Post* v. *Moore*, 181 N. Y. 15, 73 N. E. 482, testator bequeathed all of his property to his wife. A separate clause of the will stated that it was testator's wish and desire that his wife should pay a certain sum of money per year to his sister, held, not to create a trust in favor of the sister.

The modern rule, however, seems to be, according to a majority of the jurisdictions, that in order to have a trust from the use of precatory words, the court must be satisfied, from the words themselves, that the testator's intention to create an express trust is as full, complete, settled, and sure as though he had given the property to hold upon a trust declared in the ordinary manner. There can be no doubt that Kentucky is in accord with this, the modern rule. B. C.